

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FEDERATION FOR AMERICAN)
IMMIGRATION REFORM)
25 Massachusetts Ave., N.W.)
Suite 330)
Washington, DC 20001,)

Plaintiff,)

v.)

Civil Action No. _____

U.S. IMMIGRATION AND)
CUSTOMS ENFORCEMENT)
500 12th Street, S.W.)
Washington, DC 20536,)

Defendant.)

_____)

COMPLAINT

NATURE OF ACTION

1. Plaintiff Federation for American Immigration Reform (“FAIR”) brings this action against Defendant U.S. Immigration and Customs Enforcement (“ICE”) to compel its compliance with the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. On April 4, 2019, FAIR sought certain records from ICE pursuant to FOIA concerning ICE’s collection of DNA samples pursuant to law from individuals arrested, facing charges, or convicted, or from non-U.S. persons detained under the authority of the United States. ICE violated FOIA by failing to respond to FAIR’s request within the required time period, by failing to follow the procedures required by FOIA, and by failing to disclose and release the requested records. As part of the

relief prayed for in this action, FAIR requests that this Court order ICE to respond to FAIR's FOIA request and to release all the responsive records that ICE improperly withheld.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701–706.

3. This Court has jurisdiction to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*

4. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

5. Plaintiff FAIR is a non-profit entity organized under the laws of the District of Columbia and has its principal place of business at 25 Massachusetts Ave, N.W., Suite 330, Washington, DC 20001. FAIR is a tax-exempt organization under 501(c)(3) of the Internal Revenue Code. FAIR seeks to educate the citizenry on and increase public awareness of immigration issues, and hold the nation's leaders accountable for enforcing the nation's immigration laws. In furtherance of its public interest mission, FAIR regularly requests access to the public records of federal agencies and disseminates its findings to the public.

6. Defendant ICE is an agency within the United States Department of Homeland Security and is headquartered at 500 12th Street, S.W., Washington, DC 20536. ICE is an "agency" within the meaning of 5 U.S.C. § 552(f)(1), and is subject to the provisions of FOIA. ICE has possession, custody, and control of the records to which FAIR seeks access.

STATEMENT OF FACTS

7. On April 4, 2019, FAIR (through its agent, the Immigration Reform Law Institute) submitted a FOIA request to ICE, via the agency's online FOIA portal at www.ice.gov/webform/foia-request-form.

8. FAIR's April 4, 2019, FOIA request to ICE requested that the agency produce certain information and records. Specifically,

1) Copies of all ICE policies and procedures governing the collection of DNA samples from individuals arrested, facing charges, or convicted, and from non-U.S. persons who were detained under the authority of the United States. (Non-U.S. persons are defined as neither U.S. citizens nor lawful permanent resident aliens.)

2) The number of DNA samples collected by ICE from individuals who were arrested, facing charges, or convicted, and from non-U.S. persons who were detained under the authority of the United States from fiscal years 2011 through the second quarter of 2019.

3) The number of DNA samples not collected by ICE when arrests were made or when non-U.S. persons were detained from fiscal years 2011 through the second quarter of 2019.

FAIR's April 4, 2019, FOIA request to ICE hereinafter is referred to as the "FOIA Request."

9. FAIR requested that search, review, and production fees for the FOIA Request be waived. In its request, FAIR cited the public interest purpose of its FOIA Request (*see* 5 U.S.C. § 552(a)(4)(A)(iii)) and also explained that FAIR qualifies as a "representative of the news media" under 5 U.S.C. § 552(a)(4)(A)(ii)(II).

10. *Inter alia*, the disclosure of records and information that FAIR seeks through the FOIA Request is in the public interest; will contribute significantly to the public's understanding

of ICE's detainees; and is not primarily in FAIR's commercial interest. Indeed, FAIR, which is a non-profit organization, does not seek the requested records for any commercial benefit.

11. Other government agencies have acknowledged that FAIR is a "representative of the news media" for purposes of FOIA. Among other things, FAIR regularly publishes online periodicals (such as newsletters) and disseminates information through electronic communications.

12. ICE sent an email on April 8, 2019, acknowledging receipt of the FOIA Request. The email stated that the FOIA Request was received on April 4, 2019, by ICE's Freedom of Information Act Office, and that ICE assigned FOIA Case Number 2019-ICFO-33483 to the FOIA Request.

13. The April 8, 2019, email from ICE stated, in part, that:

Due to the increasing number of FOIA requests received by this office, we may encounter some delay in processing your request. Per Section 5.5(a) of the DHS FOIA regulations, 6 C.F.R. Part 5, ICE processes FOIA requests according to their order of receipt. Although ICE's goal is to respond within 20 business days of receipt of your request, the FOIA does permit a 10- day extension of this time period. As your request seeks numerous documents that will necessitate a thorough and wide-ranging search, ICE will invoke a 10-day extension for your request, as allowed by Title 5 U.S.C. § 552(a)(6)(B). If you care to narrow the scope of your request, please contact our office. We will make every effort to comply with your request in a timely manner.

In the email, ICE did not specify the date on which a determination was expected to be dispatched for the FOIA Request. In the email of April 8, 2019, ICE also stated that it was granting FAIR's request for a fee waiver.

14. In its April 8, 2019, email, ICE stated that FAIR could narrow the scope of the FOIA Request. The records that FAIR requested, however, were specific and limited in scope

and should have been released without the need for any extension of time. Accordingly, FAIR did not narrow the FOIA Request.

15. As an “agency” within the meaning of 5 U.S.C. § 552(f)(1), ICE must comply with the non-discretionary statutory requirements of FOIA.

16. FOIA establishes deadlines by which federal agencies must respond to FOIA requests and release responsive documents. 5 U.S.C. § 552(a)(6)(A). The applicable time period under FOIA for an agency to provide a response and determination is twenty working days as provided in 5 U.S.C. § 552(a)(6)(A)(i) or the applicable period, if timely and properly invoked, in 5 U.S.C. § 552(a)(6)(B)(i)-(ii). Specifically, a federal agency that is subject to FOIA and that receives a FOIA request must issue a determination within twenty (20) days after receipt of the request (excluding Saturdays, Sundays, and legal holidays). 5 U.S.C. § 552(a)(6)(A)(i). If the agency provides written notice to the requester explaining that “unusual circumstances” exist warranting additional time, the agency may be entitled to one ten (10) working day extension to respond to the FOIA request. 5 U.S.C. § 552(a)(6)(B). Within the deadlines established by FOIA, an agency must notify the requester of whether the agency has determined to comply with a request, and of the requestor’s right to appeal an adverse determination. *See* 5 U.S.C. § 552(a)(6)(A).

17. Pursuant to 5 U.S.C. § 552(a)(6)(A)(i), ICE was required to determine whether to comply with the FOIA Request within twenty (20) days (excluding Saturdays, Sundays, and legal public holidays) after receipt of that request and to notify FAIR of its determination, the reasons therefore, and the right to appeal any adverse determination unless ICE properly and timely invoked an extension under FOIA. *See* 5 U.S.C. § 552(a)(6)(B).

18. ICE received the FOIA Request on April 8, 2019. Accordingly, without a proper and timely extension, ICE's response to the FOIA Request was due by May 6, 2019.

19. 5 U.S.C. § 552(a)(6)(B)(i) of FOIA provides that:

In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

20. 5 U.S.C. § 552(a)(6)(B)(ii) of FOIA provides, in part, that:

[w]ith respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request.

21. FOIA, in 5 U.S.C. § 552(a)(6)(B)(iii), provides that:

As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests –

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

22. In its April 8, 2019, email, ICE relied on 5 U.S.C. § 552(a)(6)(B) as the grounds for a ten-day extension to respond to the FOIA Request. The only ground, however, that ICE stated in its April 8, 2019, email was that “your request seeks numerous documents that will necessitate a thorough and wide-ranging search,” ICE did not state that such a search constituted “unusual circumstances” under 5 U.S.C. § 552(a)(6)(B)(iii). ICE failed to comply with the provisions of 5 U.S.C. § 552(a)(6)(B) and was not entitled to a ten day extension.

23. Furthermore, the FOIA Request does not “necessitate” a “wide-ranging” search because, *inter alia*, FAIR requested a discrete category of records. Thus, ICE may not properly claim that “unusual circumstances” exist or invoke the claimed ten-day extension. Therefore, ICE was not entitled to an extension to respond to the FOIA Request. As a result, ICE’s response was due by May 6, 2019.

24. As of the date of this Complaint, ICE still has not complied with FOIA (including as required by 5 U.S.C. § 552(a)(6)(A)(i)), and has violated FAIR’s rights under the statute. Among other things, ICE: (i) failed to determine within 20 business days after receipt of the FOIA Request whether to comply with that request; (ii) failed to notify FAIR of any such determination and the reasons for such determination within the required time period; (iii) failed to advise FAIR of its right to appeal any adverse determination of the FOIA Request; and (iv) failed to produce the requested records or otherwise demonstrate that the requested records are exempt from production. Accordingly, ICE failed to comply with FOIA and violated FAIR’s rights under the statute, including by failing to release and produce the requested records.

25. Assuming that that ICE somehow properly could invoke a ten working day extension on April 8, 2019, by email, ICE still has violated FOIA and FAIR's rights under the statute. With a proper and timely ten working day extension, ICE was required to respond to the FOIA Request by May 20, 2019.

26. As of the date of this Complaint, however, ICE still has not complied with FOIA (including as required by 5 U.S.C. § 552(a)(6)(A)(i)) and, to the extent applicable, 5 U.S.C. § 552(a)(6)(B)), and has violated FAIR's rights under the statute. Among other things, to the extent that 5 U.S.C. § 552(a)(6)(B) is applicable, ICE (i) failed to determine within thirty working days after receipt of the FOIA Request whether to comply with that request; (ii) failed to notify FAIR of any such determination and the reasons for such determination within the required time period; (iii) failed to advise FAIR of its right to appeal any adverse determination of the FOIA Request; and (iv) failed to produce the requested records or otherwise demonstrate that the requested records are exempt from production.

27. FOIA specifically prohibits an agency that fails to respond timely to a FOIA request from charging certain fees to respond to the request. *See* 5 U.S.C. § 552(A)(4)(viii)(I)-(II)(aa)-(bb). DHS's FOIA regulations provide for the same. *See* 6 C.F.R. § 5.11(d).

28. FOIA also provides that:

Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.

5 U.S.C. § 552(a)(6)(C)(i).

29. Because ICE has failed to comply with the required time limit to respond to the FOIA Request, ICE has constructively denied the FOIA Request. FAIR, therefore, is deemed to

have exhausted any and all administrative remedies with respect to the FOIA Request. *See* 5 U.S.C. § 552(a)(6)(C)(i).

30. FAIR has exhausted its administrative remedies regarding the FOIA Request, and, therefore, is entitled to petition this Court for injunctive and declaratory relief from ICE's withholding of the requested records. *See* 5 U.S.C. § 552(a)(4)(B).

31. FAIR has a legal right to the requested records. ICE improperly has withheld those records, forcing FAIR to file suit to enforce its rights under FOIA.

COUNT I

(Violation of FOIA, 5 U.S.C. § 552)

32. FAIR re-alleges paragraphs 1 through 31 as if fully stated herein.

33. ICE failed to respond to the FOIA Request within the statutory deadlines imposed by FOIA. As a result, ICE violated FAIR's rights under FOIA, including but not limited to those set forth in 5 U.S.C. § 552(a)(6).

34. As of the date of this Complaint, ICE failed to determine whether to comply with the FOIA Request within the required time period after receipt of that request, and to notify FAIR of its determination, the reasons therefore, and the right to appeal any adverse determination.

35. As of the date of this Complaint, ICE has failed to release or produce any records in response to the FOIA Request, in violation of FAIR's rights under FOIA, including but not limited to those set forth in 5 U.S.C. § 552(a)(3)(A).

36. ICE wrongfully is withholding responsive records from FAIR that FAIR requested pursuant to 5 U.S.C. § 552. ICE failed to disclose and produce records responsive to the FOIA Request without a legal basis for withholding such records, in violation of FOIA,

including but not limited to 5 U.S.C. §§ 552(a)(3)(A) and (6)(A). The failure and/or refusal of ICE to disclose and produce records responsive to the FOIA Request is improper and unlawful.

37. FAIR is entitled to injunctive relief compelling the release and disclosure of the requested records. FAIR is being harmed by reason of ICE's unlawful withholding of the requested records. FAIR will continue to be harmed unless this Court compels ICE to comply with FOIA and applicable law.

38. FAIR is entitled to declaratory relief that ICE has violated FAIR's rights under FOIA and that FAIR is entitled to receive all non-exempt records requested in the FOIA Request.

39. FAIR is entitled to its reasonable attorneys' fees and other litigation costs under 5 U.S.C. § 552(a)(4)(E).

PRAYER FOR RELIEF

WHEREFORE, FAIR respectfully requests that the Court:

- (a) Expedite consideration of this action, pursuant to 28 U.S.C. § 1657;
- (b) Find and declare that ICE violated FOIA by failing to respond timely to the FOIA Request, by failing to follow the procedures required by FOIA, and by failing to disclose and release records in response to the FOIA Request;
- (c) Order ICE to conduct an adequate search for any and all records responsive to the FOIA Request, and require ICE to show that it employed search methods reasonably likely to lead to the discovery of the records responsive to the FOIA Request;
- (d) Order ICE to produce and release all non-exempt records responsive to the FOIA Request within twenty (20) business days of the Court's order in this action and to provide FAIR with a *Vaughn* index of any responsive records, material, or information withheld under claim of exemption;

- (e) Enjoin ICE from continuing to withhold any and all non-exempt records responsive to the FOIA Request;
- (f) Enjoin ICE from charging fees or costs for the processing of the FOIA Request (including any fees or costs for the search, review, and production of records) to the extent that ICE attempts to charge any such fees or costs for processing the FOIA Request;
- (g) Award FAIR its reasonable attorneys' fees and other litigation costs in this action, pursuant to 5 U.S.C. §552(a)(4)(E); and
- (h) Grant FAIR such other relief as the Court may deem just and proper.

Dated: October 16, 2019

Respectfully submitted,

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